



SO ORDERED.

SIGNED this 16 day of November, 2004.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
MICHAEL HOWARD DIXON)	Case No. 04-42757
)	Chapter 13
Debtor.)	
_____)	
)	
MICHAEL HOWARD DIXON)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 04-7110
)	
UNITED STATES OF AMERICA)	
INTERNAL REVENUE SERVICE)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER DENYING MOTION TO DISMISS

This matter is before the Court on Defendant's Motion to Dismiss Adversary Proceeding.¹ Both parties have submitted briefs on this matter, and the Court is prepared to rule. Although Debtor has set

¹Doc. 11.

this motion for a hearing, the Court finds that such hearing is unnecessary given the nature of this dispute and the lack of any evidentiary issues. The Court has jurisdiction to decide this matter,² and it is a core proceeding.³

I. FINDINGS OF FACT

Plaintiff, Michael Howard Dixon (“Dixon”), filed for relief under Chapter 13 of the Bankruptcy Code on October 4, 2004. He immediately filed this adversary proceeding seeking a determination that certain tax debts owed to Defendant, United States of America, acting through the Internal Revenue Service (“IRS”), are dischargeable.⁴ Although Plaintiff cites to no statutory basis for the relief requested, the Court assumes Debtor seeks a discharge under 11 U.S.C. § 523(a)(1)(B),⁵ since he alleges that the taxes in question are for taxes, the returns for which were filed more than three years before the filing of the petition.

Dixon’s Chapter 13 plan has not yet been confirmed. The IRS has moved to dismiss this matter pursuant to Fed. R. Civ. P. 12(b)(1) and (6).⁶ According to the IRS, this case is not yet ripe for

²28 U.S.C. § 1334.

³28 U.S.C. § 157(b)(2)(I).

⁴Although Dixon requests taxes due the State of Kansas also be discharged in his prayer for relief in the Adversary Complaint, the State of Kansas is not a party to this proceeding.

⁵The local Special Procedures Staff for the IRS, located in Wichita, Kansas, has advertised to the bankruptcy bar that it will process informal requests for discharge of such taxes under § 523(a)(1)(B), without the necessity of filing a complaint, and thus this Court rarely sees these complaints.

⁶Fed. R. Civ. P. 12(b) is made applicable to this proceeding by Fed. R. Bankr. P. 7012(b).

determination because the Court cannot enter a discharge of this debt, pursuant to 11 U.S.C. § 1328,⁷ until the Debtor completes the payments under his Chapter 13 Plan, or until a hardship discharge is entered under § 1328(b).

II. CONCLUSIONS OF LAW

At issue in this case is whether the Court can hear a case, and issue an order, concerning the dischargeability of debt in a Chapter 13 case prior to the completion of the Chapter 13 plan or the entry of a hardship discharge under § 1328(b).⁸ Debtor does pray that his tax obligations be “discharged,” although he does not qualify the prayer with a specific time when that relief should be granted. As the IRS correctly points out, Dixon is not entitled to a discharge until he has completed all payments under his Chapter 13 plan or until a hardship discharge is entered, both of which obviously occur post-confirmation.⁹ Because Dixon’s Chapter 13 plan has not yet been confirmed, he is not eligible for a discharge of any debts at this time.

That said, the Court is cognizant that in order to demonstrate feasibility, Debtor may need to establish that the taxes in question will ultimately be discharged, and that he therefore is not required to provide for their payment in his Chapter 13 Plan. A complaint to determine the dischargeability of debt,

⁷All future statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

⁸The IRS notes that the Court previously ruled on this question in *Lortscher v. IRS (In re Lortscher)*, Case No. 03-7106 (Bankr. D. Kan. January 5, 2003). However, in *Lortscher*, the Debtor never responded to the IRS’ motion to dismiss, and the default order was entered in the form submitted by the IRS. Because the Court’s prior dismissal was entered as a result of Debtor’s implied consent, the Court finds that it has little, if any, persuasive value.

⁹See 11 U.S.C. § 1328(a) and (b).

other than one under § 523(c) which is not applicable here, “may be filed at any time.”¹⁰ “In a chapter 13 case, such proceedings need not await the completion of the plan or a motion for a hardship discharge.”¹¹ Although Dixon is clearly not entitled to an order that would discharge the debt owed to the IRS at this time, there is nothing to prohibit him from seeking a determination that, upon successful completion of the plan and discharge, or an entry of order granting a hardship discharge under § 1328(b), this tax debt will be discharged.¹²

III. CONCLUSION

The Court finds that the Motion to Dismiss Adversary Proceeding must be denied. Rule 4007 plainly states that a proceeding to determine the dischargeability of a debt may be filed at any time. The fact that Dixon is not entitled to an order actually discharging the debt at this time does not change the fact that he can seek a judicial determination as to the ultimate dischargeability of the debt at this time. If Debtor establishes that the debt is the kind that is dischargeable upon completion of his Chapter 13 Plan, the Order should indicate that upon completion of the plan and receipt of a discharge, this debt would similarly be deemed discharged.

¹⁰Fed. R. Bankr. P. 4007(b)

¹¹9 Collier on Bankruptcy ¶ 4007.03 (1999). *See also Craine v. United States (In re Craine)*, 206 B.R. 598 (Bankr. M.D. Fla. 1997) (rejecting the precise issue raised by the IRS in this matter and holding that debtor’s complaint to determine the dischargeability of tax debt was ripe for adjudication despite the fact that neither of the two conditions which would entitle debtor to a discharge had been met) and *United States v. Clavelle (In re Clavelle)*, 1994 WL 780695 (W.D. La. 1994) (holding that “under the clear and plain meaning of [Rule 4007],” debtor’s complaint to determine the dischargeability of tax debts was ripe for adjudication prior to the completion of the Chapter 13 plan).

¹²This Court agrees with those courts finding that a § 523(a)(8) undue hardship complaint is premature at this pre-confirmation stage of the proceedings, but not an adversary proceeding where Debtor’s ability to pay the debt is not an issue, as is the case here.

Pursuant to Fed. R. Bankr. P. 7012(a), the United States shall file its answer within ten days after notice of this decision. The Court also sets this matter for a Scheduling Conference on **December 23, 2004 at 9:00 a.m.** in Room 215, United States Bankruptcy Court, 444 S.E. Quincy, Topeka, Kansas. Counsel shall comply with Fed. R. Civ. P. 26(f) by conferring in person or by telephone not later than December 13, 2004, and counsel for Plaintiff shall file, by **December 17, 2004**, a Report of the Parties' Planning Meeting, the form for which can be found on this Court's website.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Motion to Dismiss Adversary Proceeding (Doc. 11) is denied.

IT IS SO ORDERED.

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